

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

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COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

LEONARD TURNER,

Appellant.

2 CA-CR 2006-0046

DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of  
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20050290

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General

By Randall M. Howe and Kathryn A. Damstra

Tucson  
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender

By Kristine Maish

Tucson  
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 A jury found appellant Leonard Turner guilty of aggravated driving under the influence of an intoxicant while his license was suspended or revoked and aggravated driving

with an alcohol concentration of .08 or more while his license was suspended or revoked. The trial court sentenced Turner to concurrent, presumptive prison terms of 2.5 years. On appeal, Turner contends the trial court erred in denying his motion for mistrial, which was based on testimony the prosecutor elicited from the arresting officer that Turner had requested an attorney after he was told his rights.

A declaration of a mistrial . . . is “the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.” We will not overturn a trial judge’s decision to deny a motion for mistrial unless we find an abuse of discretion.

*State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003), *quoting State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). Finding no abuse of discretion in the court’s ruling, we affirm.

¶2 Just after midnight on New Year’s Day, Officer Donald Mattus observed Turner driving a pickup truck on the freeway and weaving. Mattus’s vehicle was equipped with a video camera that he activated as he followed Turner, and the jury viewed portions of the resulting videotape. Mattus testified that after he stopped Turner, Turner was “slow” in complying with Mattus’s request that he get out of the vehicle, he was “weaving” as he walked and swayed back and forth when he stood still, he was unable to remain standing while Mattus spoke with him, his breath smelled of alcohol, his eyes were red and watery, his speech was slurred, and he did not give his true name to Mattus. Turner did not perform well on either the horizontal gaze nystagmus or field sobriety tests. A blood sample was

obtained pursuant to a search warrant, which showed his alcohol concentration was .171 and .173.

¶3 Before trial, the court granted Turner’s motion in limine “[t]o preclude any comment by the prosecutor or state’s witnesses that the defendant had asked to speak with an attorney . . . [because] [s]uch comment would amount to a due process violation, requiring a mistrial.” At trial, Mattus testified on direct examination that he had read a card stating Turner’s rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). The prosecutor then asked Mattus how Turner had responded when Mattus asked him if he understood his rights. Mattus testified that Turner had answered, “Whatever.” The prosecutor later elicited from Mattus that he had given Turner the *Miranda* warnings a second time after Turner had insisted he had not been told his rights earlier. The prosecutor then asked Mattus, “Do you[] know how [Turner] responded on that occasion?” to which Mattus replied, “Yes, I do.” Without objection from defense counsel, the prosecutor asked, “How did he respond?” to which Mattus answered, “He requested to speak to an attorney.” Defense counsel objected and requested a mistrial, which the trial court initially said it was inclined to grant, but which it ultimately denied.

¶4 Turner argues the trial court should have granted his motion for mistrial because the prosecutor improperly elicited testimony from Mattus about Turner’s invocation

of his right to remain silent.<sup>1</sup> Relying on *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976), Turner argues that a prosecutor’s introduction of evidence of a defendant’s invocation of the right to remain silent at the time of arrest and after receiving *Miranda* warnings can constitute a due process violation. See *State v. Siddle*, 202 Ariz. 512, ¶ 5, 47 P.3d 1150, 1153 (App. 2002); *State v. Gilfillan*, 196 Ariz. 396, ¶ 36, 998 P.2d 1069, 1079 (App. 2000); *State v. Keeley*, 178 Ariz. 233, 235-36, 871 P.2d 1169, 1171-72 (App. 1994). Arguing against the granting of a mistrial, the prosecutor explained that he had “discussed the areas not to be discussed” with Mattus and that “the only mention [was] the request for an attorney [and] not . . . what the response was after the request.” Acknowledging that his question to Mattus “was inartfully . . . phrased,” the prosecutor explained that his sole intent in asking Mattus how Turner had responded was to establish that Turner had understood his rights. Although the prosecutor suggested that the court strike Mattus’s answer, it does not appear this occurred.

¶5 Turner argued to the trial court, as he does on appeal, that a mistrial should have been granted because the prosecutor intentionally elicited information about Turner’s having requested counsel, noting that this was particularly egregious in light of the court’s granting of the motion in limine to preclude this very testimony. We are disturbed by the prosecutor’s questioning Mattus in direct violation of the trial court’s ruling on the motion

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<sup>1</sup>Although the actual testimony involved Turner’s request for an attorney, the parties have characterized it as a comment on his right to remain silent.

in limine. Moreover, we fail to see the relevancy of this line of questioning. That being said, however, based on the other factors the trial court presumably considered in denying Turner's motion for mistrial, we cannot find the court abused its discretion in ruling as it did. "[B]ecause the trial judge is in the best position to assess the impact of a witness's statements on the jury, we defer to the trial judge's discretionary determination." *Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d at 244, *citing State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000).

¶6 Although harmless error analysis may apply in this type of case, "[a]ppellate courts . . . are reluctant to apply the harmless error doctrine when it appears that the error was deliberate and willful." *State v. Sorrell*, 132 Ariz. 328, 330, 645 P.2d 1242, 1244 (1982). However, in light of the prosecutor's claim that he intended to establish that Turner understood his rights and the trial court's denial of the motion for mistrial after Turner raised this very argument, a request the court took under advisement before it ruled, we can infer that the court rejected the argument that the prosecutor's conduct was willful and deliberate.

¶7 Importantly, once Mattus briefly mentioned Turner's request for an attorney, which the prosecutor had not mentioned during his opening statement, the prosecutor did not mention it again or imply that the request constituted evidence of guilt. *Cf. State v. Palenkas*, 188 Ariz. 201, 213, 933 P.2d 1269, 1281 (App. 1996) (finding due process violation not harmless error, in part because prosecutor's reference to defendant's assertion of constitutional rights was not "just a single innocuous reference by a witness"). We note, moreover, that the verdicts here did not "turn[] on the jury's resolution of a credibility

contest between the arresting officer and the defendant,” as it did in *Keeley*, 178 Ariz. at 236, 871 P.2d at 1172, one of the cases Turner relies on. Rather, there was overwhelming and uncontroverted evidence of Turner’s guilt. Accordingly, “[t]here was no reasonable probability that the evidence materially affected the outcome of the trial and, therefore, no error requiring reversal.” *Gilfillan*, 196 Ariz. 396, ¶ 38, 998 P.2d at 1079. We therefore affirm Turner’s convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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GARYE L. VÁSQUEZ, Judge